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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 289

LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*

*vs.*

ROBERT J. SINDELAR, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH C. SINDELAR, DECEASED, AND CAROLYN L. SINDELAR,
*Respondents.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The reasons for allowance of a writ, assigned by petitioner on pages 4 and 5 of its petition, are insufficient.

Speaking generally of the four grounds on which the Court is asked to take the case, we assert, without need for amplification, that none of them falls within the situations contemplated by Subsection 5 of Rule 38 of this Court.

Specifically, we discuss them in the following order: 1, 3, and 2 and 4 together as going to the same point.

1.

**Great Public Interest.**

Petitioner gives no record references to support the factual statements and implications contained in its ground 1. There is neither allegation nor proof that the policies are identical or that the same form of policy as in the case at bar is used in all but four or five States of the Union. On the contrary, it is apparent from the reported cases that the policies vary materially as to the endorsements employed, and that, accordingly, each case is determined on its own facts.

Even if the facts as asserted be taken as true, and even if under Rule 38 of this Court, or otherwise, public interest were a ground for issuance of a writ, the facts stated do not establish a case or point of "great public interest." The petitioner itself does not conclude that they do. It concludes only "if the opinion of the Circuit Court of Appeals is to prevail, these policies are subject to this erroneous interpretation."

What was involved in the trial court and the Circuit Court of Appeals was a mere question of interpretation of provisions which the defendant company had advisedly retained in its contracts for at least five years following the decision of the Supreme Court of Indiana in the case of *American Mutual etc. Co.* v. *Duesenberg*, 14 N. E. (2d) 919 (Indiana, 1938), a decision adverse to the construction for which it now contends.

Patently these policies are written on an annual basis. In the case at bar the policy covered a period commencing March 31, 1943 and ending March 31, 1944 (R. 11). At the expiration of its term it would be necessary to issue a new contract or to renew the policy if the insurance was to be continued in effect.

If petitioner did not intend that its policy should give the coverage to the president of the corporation which the Court of Appeals has determined that it does, it is pertinent to ask why it is that five years after the decision of the Indiana Supreme Court the insurance company was still writing such insurance in Illinois on exactly the same Standard Policy form as was involved in the *Duesenberg* case. If the policy were construed by the courts according to petitioner's contention, the ostensible increased coverage would be a valuable sales stimulant, without the insurance company undertaking a correspondingly increased liability —as is pointed out at page 715 of the opinion of the United States Circuit Court of Appeals in this case.

As the matter stands we respectfully submit that it is neither the public nor a large group of policyholders who are adversely affected by the decision sought to be reviewed but merely the petitioner itself.

## 3.

### Conflict Between the Courts.

A conflict, if any, between the decisions of Indiana and those of Oklahoma, Illinois and New York would not be ground for the issuance of the writ under Rule 38 of this Court. Nor would a conflict between two decisions of the Seventh Circuit of the United States Circuit Court of Appeals.

However, even if either such conflict were a ground for granting the writ, there is in fact no conflict here.

The problem of interpretating the policy is one to be resolved by the Court in this case upon its own construction of the law of Illinois, since, as the petitioner admits at page 41 of its petition, there is no decision by any Illinois court on this specific question. That being so, how can the

Illinois decisions be said to be in conflict with those of Indiana or in harmony with those of Oklahoma and New York?

*Phillips* v. *Industrial Commission,* 390 Ill. 335, 61 N. E. (2d) 681, is a case in which an injured employee sought to recover damages before the Industrial Commission under the Workmen's Compensation Act. The construction of an insurance policy was not even involved.

The case of *Morris* v. *Central West Co.,* 351 Ill. 40, 183 N. E. 595, not mentioned in the petition but referred to at page 39 of petitioner's brief, while not decisive of the specific point, is more analogous to the case at bar. In that case an employer of labor was allowed to recover in an action directly against the insurance company under a rider containing language quite similar to the language in Paragraph FIVE of the policy in question here.

The only case which either petitioner or respondent has found decisive of the specific question involved in the instant case is that of *American Mutual etc. Co.* v. *Duesenberg,* 14 N. E. (2d) 919. The Supreme Court of Indiana in that case and the United States Circuit Court of Appeals for the Seventh Circuit in the case at bar reached the same conclusion on the same facts.

In so doing, the Court of Appeals for the Seventh Circuit did not reverse the position which it took in *Wood* v. *Employers Corporation,* 41 F. (2d) 573 (CCA 7). For reasons argued to it and in part stated in its opinion in the case at bar it considered the case distinguishable. Judge Sparks, who wrote the majority opinion in the *Wood* case, was one of the members of the court which decided the case at bar. In any event, if the decision in the latter case is inconsistent with the decision in the *Wood* case, the *Wood* case is to be taken as overruled to the extent of such inconsistency, which, again, is not a ground for granting the writ cognizable under Rule 38.

Nor are the Oklahoma and New York cases cited at page 4 of the petition in conflict with the Indiana decision in the *Duesenberg* case.

In *Fidelity Casualty Co. of N. Y.* v. *Gray,* 72 P. (2d) 341 (Okla.), the question involved was whether a workman who suffered loss of hearing by exposure to a turbine during the course of his employment was entitled to recover in an action brought against the insurance company directly on the policy. The case did not involve an officer of the corporation and did not involve the portion of Paragraph FIVE of the policy upon which we rely. Furthermore, the workman conceded that his injury was not an accidental injury and the policy clearly applied to accidental injuries only.

*Utica Mutual Insurance* v. *Glennie,* 230 N. Y. S. 673, was a case in which an action was brought by the insurance company against Glennie, the company of which he was president, and the driver of the company's car in which he was injured for a declaratory judgment to determine whether the insurance company was bound to defend a prior action brought by Glennie against his company for damages at common law, and whether if Glennie obtained such a judgment, the insurance company was under an obligation to pay the judgment. The question of whether the insurance company would be liable to Glennie in a direct action against the insurance company for damages in the same amount as Glennie would be entitled to if covered by the Workmen's Compensation Act was not involved in the case and the court expressed no opinion on that question, either directly or inferentially.

**2 and 4.**

**The Decision of the Court of Appeals Precludes the Petitioner from Introducing Evidence of the Intention of the Parties to the Contract—If the Contract IS Ambiguous.**

If affirmed, the decision of the United States Circuit Court of Appeals stands as the law of the case and leaves for determination in the trial court merely the question as to whether the deceased while president of his company was accidently injured while engaged in the performance of duties for his company and the question of the nature and extent of the damages.

The policy was set forth in *haec verba* in the complaint (R. 3-21). The complaint declared specifically upon Paragraph FIVE of the policy and the Workmen's Compensation Endorsement, including Section 6 thereof (R. 22 and 24). The defendant's motion to strike the complaint challenged its legal sufficiency on the facts therein pleaded (R. 27). The trial court's memorandum opinion shows that the motion to strike and the briefs submitted dealt principally with the contention that the complaint states no cause of action against the defendant (R. 35). The memorandum opinion also shows that the court in disposing of the principal question so raised actually construed the provisions of the policy and endorsement relied upon adversely to the plaintiffs and in favor of the defendant (R. 37). Thereupon, the plaintiffs were entitled to amend their complaint if they saw fit. They waived the right to do so by electing to stand upon their complaint, thereby indicating that the case was to be determined upon the pleadings and solely upon a point of law. Accordingly, judgment was entered for the defendant and the complaint was dismissed (R. 39 and 40).

When the plaintiffs stood upon their complaint and

tendered a disposition of the case on a point of law, the defendant did not seek leave to answer so as to create an issue of fact as to the intention of the parties to the contract. Rather, it acquiesced in the disposition of the question as a matter of law.

In this situation we submit that neither of the parties is at liberty to amend or in any way to plead further in respect of the true meaning of the policy after the ultimate disposition of the question by the reviewing courts. We say that if the petitioner ever had the right, it has waived it.

We submit, however, that the right to offer evidence of intention never existed at any stage of the proceeding.

The four cases cited by petitioner at page 4 of its petition under ground 2, one of which is again cited under ground 4, do not support its contention that such right exists. At page 38 of its brief, however, petitioner cites *American Stevedores, Inc.* v. *Porello,* 67 S. Ct. 847. Petitioner tells this Court that that case announces a new rule of construction which the Circuit Court of Appeals failed to apply.

Petitioner says that that case involved the construction of an ambiguous indemnity clause in a contract "prepared by the Government" and that instead of applying the theretofore well-established and universal rule that ambiguity in a contract will be resolved against the party who drafted it, this Court announced a new rule of law now binding on the Court of Appeals by directing that the case be remanded to take evidence as to the intended meaning.

The case did not involve the construction of an insurance policy. It involved the construction of an ambiguous indemnity clause in a contract between the United States and American Stevedores, Inc., which presumably was prepared by both parties. There is not a word in the Supreme Court's opinion, nor in the opinion of the Circuit Court of Appeals (153 Fed. (2d) 205), which warrants the repre-

sentation that the contract "was prepared by the Government."

Standard forms of insurance policies are drafted by insurance companies and are their creations. Therefore, they are universally construed in accordance with the rule that fair doubt as to the meaning of a contract will be resolved against the party who had control of its phraseology. (See *Morris* v. *Central West Casualty Co.*, 351 Ill. 40, 183 N. E. 595; *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. 90; and *Paddleford* v. *Fidelity & Casualty Co.*, 100 Fed. (2d) 606 (C. C. A. 7).

Moreover, at page 854 of its opinion in the case of *American Stevedores, Inc.* v. *Porello* this Court noted that it was not clear from the record whether the district court made any finding as to the meaning of the contract and this Court observed that its interpretation should be left, in the first instance, to the district court. As we have pointed out, in the case at bar, the district court expressly interpreted the provisions in question under the circumstances to which we have referred above. It is to be noted, too, that although the decision of this Court in the *American Stevedores* case was rendered March 10, 1947, and although footnote 23 at page 853 of the opinion of this Court indicates that there a motion was made to the court of appeals for an order allowing the parties to take proof, no such request was made in the case at bar prior to the decision of that court May 9, 1947.

We submit that the persons insured under the Standard Policy here involved patently had no part in drafting it but bought only what the petitioner insurance company had for sale. We submit, also, that nothing said by this Court in the case of *American Stevedores* v. *Porello*, 67 S. Ct. 847, in any way indicates that ambiguous provisions, if any, in an insurance contract shall not be resolved against the insurance company which drew it. We con-

clude, therefore, that even if there *is* ambiguity, the decision of the Circuit Court of Appeals in this case must stand.

We submit, however, that the provisions in question are not ambiguous and that the opinion of the United States Circuit Court of Appeals is actually based upon its determination of their true meaning and effect and not really upon the rule that ambiguities will be resolved in favor of the insured.

It is true that the United States Circuit Court of Appeals at pages 716-717 of its opinion says that the situation presented is one which calls for an application of the rule that a policy must be construed so as to give effect to all of its provisions if possible as well as the rule that ambiguities will be resolved in favor of the insured. But the fact is that only the first rule is applicable to the situation presented and is the only rule applied. At page 715 of its decision the Circuit Court of Appeals said:

> "* * * there is not the slightest ambiguity as to those who are covered under either One (a) or One (b)."

On that premise the court then held that to give any meaning or effect to the second half of Paragraph FIVE it was necessary to construe it in accordance with our contention. The Court of Appeals found no ambiguity and the word is not used in the opinion except in the statement of the rule on pages 716-717.

## Conclusion.

It is respectfully submitted no ground exists for granting the petition for a writ of certiorari.

Respectfully submitted,

VINCENT O'BRIEN,
*Counsel for Respondents.*